TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 347

MAX JABEN, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1964
CERTIORARI GRANTED OCTOBER 19, 1964

SUPREME COURT OF THE UNITED STATES

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No. 347

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 13, 1964

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[fol. A]

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

No. 21547

UNITED STATES OF AMERICA,

—against—

MAX JABEN.

COMPLAINT FOR VIOLATION OF SECTION 7201 INTERNAL REVENUE CODE OF 1954—Filed April 15, 1963

Before Lee E. Cisel, United States Commissioner, Western District of Missouri.

The undersigned complainant, being duly sworn, states: That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, in the Western District of Missouri, Max Jaben did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, [fol. B] and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income

for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

David A. Thompson, Special Agent, Internal Revenue Service, Kansas City, Missouri.

Sworn to before me and subscribed in my presence, this 15th day of April, 1963.

Lee E. Cisel, United States Commissioner.

(Seal)

[fol. C]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

Commissioner's Docket No. 27

Case No. 229

UNITED STATES OF AMERICA,

v.

MAX JABEN.

SUMMONS

To Max Jaben

You are hereby summoned to appear before the undersigned United States Commissioner Kansas City, Missouri, at 517 U. S. Court House on May 15, 1963, at 10 o'clock A.M. to answer to a complaint charging you with wilfully attempting to evade and defeat the income taxes due and owing by you to the United States of America for the calendar year 1956 in violation of U.S.C. Title 26 Section 7201.

Lee E. Cisel, United States Commissioner

Date April 15, 1963

This summons was received by me at on 19

Max Jaben, Defendant.

RETURN*

This summons was served by me on April 15, 1963, in the following manner:

By handing and leaving a true Copy of Summons and Complaint with Max Jaben at the Federal Courthouse Room 509 K.C. Mo. at 3:30 PM on this the 15th Day of April 1963.

Francis M. Wilson, U. S. Marshal, By Francis R. Wallis, DUSM.

		3.00
END Wallis 4-15-1963	56 Mi.	$6.72
		9.72

[fol. D] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

No. 21547

UNITED STATES OF AMERICA, Plaintiff,

vs.

MAX JABEN, Defendant.

INDICTMENT—May 17, 1963

THE GRAND JURY CHARGES:

Count I

That on or about the 16th day of April, 1957, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, did wilfully and knowingly attempt

---

* As to who may serve the summons and the manner of its service see Rule 4 (c) of the Federal Rules of Criminal Procedure and Rule 4 (c) of the Rules of Civil Procedure.

to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $17,665.31 and that the amount of tax due and owing thereon was the sum of $6,017.82, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $40,001.76, upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

Count II

That on or about the 15th day of April, 1958, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, did wilfully and knowingly make and [fol. E] subscribe and file and cause to be filed with the District Director of Internal Revenue for the Internal Revenue Collection District of Kansas City, Missouri, at Kansas City, Missouri, a Form 1040 United States Individual Income Tax Return for the calendar year 1957, which was verified by a written declaration that it was made under the penalties of perjury, which said Form 1040 United States Individual Income Tax Return for the calendar year 1957 he did not believe to be true and correct as to every material matter in that in the said Form 1040 United States Individual Income Tax Return for the calendar year 1957 he stated that his taxable income for the calendar year 1957 was the sum of $22,370.02 and that the amount of tax due and owing thereon was the sum of $7,364.60, whereas, as he then and there well knew and believed he had during calendar year 1957 received taxable income of $25,466.47 upon which said taxable income he owed to the United States of America an income tax of $7,430.58.

In violation of Section 7206(1), Internal Revenue Code; 26 U.S.C., Section 7206(1).

Count III

That on or about the 13th day of July, 1959, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, who during the calendar year 1958 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1958, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $14,020.13 and that the amount of tax due and owing thereon was the sum of $3,383.64, whereas, as he then and [fol. F] there well knew, their joint taxable income for the said calendar year was the sum of $24,039.46, upon which said taxable income there was owing to the United States of America an income tax of $6,816.97.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A True Bill

George H. Flamank, Foreman.

K. William O'Connor, Special Atty., Dept. of Justice,
James J. Featherstone, Special Attorney, Dept. of Justice,
F. Russell Millin, U. S. Attorney.

(See Opposite)

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

UNITED STATES COMMISSIONER
WESTERN DISTRICT OF MISSOURI

BEFORE LEE E. CISEL (Name of commissioner) — KANSAS CITY, MISSOURI (Address)

COMMISSIONER'S DOCKET NO. 27 CASE NO. 229
THE UNITED STATES
vs.
MAX JABEN

Complaint filed on Apr. 15, 1963, by David A. Thompson
Official title SA IRS, charging violation of United States Code, Title 26, Section 7201, on Apr. 16 19 57, at Kansas City, Mo in the division of the Western district of Missouri as follows: did file a fraudlent income tax return with intent to evade and defeat income taxes due and owing by him to the U.S.

(Here insert brief summary of facts constituting offense charged)

WARRANTS OR SUMMONS ISSUED:
Date Apr. 15, 1963 ~~Warrant~~/Summons for Defendant (Name of defendant)
to (name and title of officer)
Substance of return Summons served on the defendant in Kansas City, Missouri on Apr. 15, 1963 by Francis R. Wallis, Deputy U.S. Marshal
Date Warrant/Summons for (Name of defendant)
to (name and title of officer)
Substance of return

FILED
JUN 13 1963
J. C. TRUMAN, CLERK
BY DEPUTY CLERK

PROCEEDINGS ON FIRST PRESENTATION OF ACCUSED TO COMMISSIONER:
Date Arrested by on warrant of (Name of issuing officer) without warrant.
Appearances: for United States (Name) (Address)
for accused (Name) (Address)
Proceedings taken
(Here insert with dates, when appropriate, a seriatim account of essential steps taken at hearing such as "complaint prepared,"
if arrest is without warrant: "defendant informed of complaint and right to retain counsel and preliminary hearing": "preliminary examination waived,"
if that is the fact; any adjournments taken, etc.

NO FURTHER PROCEEDINGS: At request of F. Russell Millin, U.S. Attorney, a transcript of all proceedings before your commissioner without a preliminary hearing or dismissal of the complaint is filed in the office of the Clerk of this Court.

[fol. 6]

Date Filed ..... (Name of commissioner) ..... (Address)

COMMISSIONER'S
DOCKET No. 27 CASE No. 229
THE UNITED STATES
vs.
MAX JABEN

Complaint filed on Apr. 15, 1963, by David A. Thompson
Official title SA IRS, charging violation of United States Code, Title 26, Section 7201, on Apr. 16 1957, at Kansas City, Mo in the division of the Western district of Missouri as follows: did file a fraudlent income tax return with intent to evade and defeat income taxes due and owing by him to the U.S.

(Here insert brief summary of facts constituting offense charged)

WARRANTS OR SUMMONS ISSUED:
Date Apr. 15, 1963 Warrant/Summons for Defendant (Name of defendant)
to (name and title of officer) .....
Substance of return Summons served on the defendant in Kansas City, Missouri on Apr. 15, 1963 by Francis R. Wallis, Deputy U.S. Marshal
Date ..... Warrant/Summons for ..... (Name of defendant)
to (name and title of officer) .....
Substance of return .....

FILED
JAN 13 1963
J. C. TRUMAN, CLERK
BY ..... DEPUTY CLERK

PROCEEDINGS ON FIRST PRESENTATION OF ACCUSED TO COMMISSIONER:
Date ..... Arrested by ..... on warrant of ..... (Name of issuing officer) without warrant.
Appearances { for United States ..... (Name) (Address)
for accused ..... (Name) (Address)
Proceedings taken .....
(Here insert with dates, when appropriate, a seriatim account of essential steps taken at hearing such as "complaint prepared."
If arrest is without warrant: "defendant informed of complaint and right to retain counsel and preliminary hearing": "preliminary examination waived."
If that is the fact; any adjournments taken, etc.
NO FURTHER PROCEEDINGS: At request of F. Russell Millin, U.S. Attorney, a transcript of all proceedings before your commissioner without a preliminary hearing or dismissal of the complaint is filed in the office of the Clerk of this Court.

Outcome .....

Bail fixed ....., 19..... Amount, $..... Bonded ....., 19....., by cash deposited by (name) ..... Address ..... transmitted to clerk of district court ....., 19..... [or] by surety (name) ..... Address ..... (name) ..... Address ....., who justified by affidavit dated ....., 19....., [or] committed to ..... on ....., 19.....

[fol. 6]

SUBPOENAS FOR WITNESSES ISSUED:

....., 19....., for (name of tness).....

at request of (name of party).....

Substance of return.....

.....

....., 19....., for (name of witness).....

at request of (name of party).....

Substance of return.....

.....

....., 19....., for (name of witness).....

at request of (name of party).....

Substance of return.....

.....

PRELIMINARY EXAMINATION:

(Not to be used if case was disposed of at first presentation)

Date..... Appearances for { United States (Name) ..... (Address) ..... Accused (Name) ..... (Address) .....

WITNESSES FOR UNITED STATES: (List names and addresses)

....., ...

....., ...

....., ...

....., ...

WITNESSES FOR ACCUSED: (List names and addresses)

....., ...

....., ...

....., ...

....., ...

Witness payroll containing..... names certified to United States Marshal for payment....., 19.....

Proceedings taken.....

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Outcome.....

Bail fixed....., 19..... Amount, $..... Bonded....., 19....., by cash deposited by (name)..... Address.....

transmitted to clerk of district court....., 19.....

[or] by surety (names)..... Address.....

and..... Address.....

who justified by affidavit....., 19..... Committed to.....

on....., 19.....

Certified to be a correct transcript.

Made this 13th day of June, 19 63

.....

....., 19....., for (name of tness).....
at request of (name of party).....
Substance of return.....

....., 19....., for (name of witness).....
at request of (name of party).....
Substance of return.....

....., 19....., for (name of witness).....
at request of (name of party).....
Substance of return.....

PRELIMINARY EXAMINATION:
(Not to be used if case was disposed of at first presentation)

Date..... Appearances for { United States (Name) ..... (Address) ..... / Accused (Name) ..... (Address) ..... }

WITNESSES FOR UNITED STATES: (List names and addresses)

....., ...
....., ...
....., ...
....., ...

WITNESSES FOR ACCUSED: (List names and addresses)

....., ...
....., ...
....., ...
....., ...

Witness payroll containing.....names certified to United States Marshal for payment....., 19.....
Proceedings taken.....

Outcome.....
Bail fixed....., 19..... Amount, $..... Bonded....., 19....., by cash
deposited by (name)..... Address.....
transmitted to clerk of district court....., 19.....
[or] by surety (names)..... Address.....
and..... Address.....
who justified by affidavit....., 19..... Committed to.....
on....., 19.....
Certified to be a correct transcript.
Made this 13th day of June, 19 63
Transmitted to Clerk of United States District Court for the Western
district of Missouri, June 13, 19 63

.....
United States Commissioner.

[fol. 1]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

No. 21547-3

UNITED STATES OF AMERICA, Plaintiff,

vs.

MAX JABEN, Defendant.

Excerpts From Transcript of Oral Argument on All Motions Now Pending—August 6, 1963

Be It Remembered, that on Tuesday, August 6, 1963, the above entitled cause came on for oral argument on Defendants' Motion to Dismiss, Motion for a Bill of Particulars, Motion for Production of Documentary Evidence and Objections under Rule 17(c), Motion for Discovery and Inspection under Rule 16, and Motion to Suppress Evidence; also Motion of F. Russell Millin, United States Attorney, to Quash the Subpoena of the Defendant dated August 2, 1963; Motion of David A. Thompson, Special Agent, Internal Revenue Service, to Quash the Subpoena of the Defendant Dated August 2, 1963, before the Honorable Richard M. Duncan, Judge, at the Court House in Kansas City, Missouri.

APPEARANCES:

The Plaintiff was represented by Hon. F. Russell Millin, United States Attorney, Kansas City, Missouri, and Hon. [fol. 2] Donald A. Hansen, Trial Attorney, Department of Justice, Washington, D. C.

The Defendant was represented by Mr. Morris Shenker and Mr. E. Shapiro, Attorneys at Law, 408 Olive Street, St. Louis, Missouri; Mr. James P. Quinn and Mr. Kenneth Cohn, Attorneys at Law, Kansas City, Missouri.

Whereupon, the following proceedings were had and entered of record:

The Court: All right, gentlemen, proceed whenever you are ready. Whatever you want to take up first is all right with me.

Mr. Shenker: May it please your Honor, with reference to the motions that we have set for hearing this morning, some of the motions require the taking of testimony, and I thought in the interest of orderly procedure, that we might proceed with the Motion to Dismiss first, and then going from there to the other motions.

The Court: I think that would be the best way to handle it.

Mr. Millin: All right.

DEFENDANT'S CASE

Whereupon, the defendant, to sustain the issues in his behalf, offered the following testimony, among others, oral and documentary, and made the following admissions, to-wit:

[fol. 3] LEE E. CISEL being produced, sworn and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Shenker:

Q. Will you please state your name?

A. My name is Lee E. Cisel.

Q. Your occupation?

A. I am the United States Commissioner in the Western District of Missouri at Kansas City.

Q. And you were so engaged and so occupied the same position on April the 15th, 1963?

A. I did.

Q. Judge, I will ask you if on that date you had occasion to issue a complaint with reference to the defendant, Max Jaben?

A. Did you say 16th or 15th?

Q. Beg pardon?

A. Did you say the 16th or 15th? The complaint was filed before me. I didn't issue the complaint on that date.

Q. You issued the summons?

A. I issued a summons on that date, yes.

Q. Was that on the 15th?

A. The 15th day of April, 1963.

Q. Do you have your record with you pertaining to this matter?

[fol. 4] A. I have some record, I brought all my record, but some of my records are in the District Clerk's office.

Q. You brought all those that you have?

A. All that I have, yes.

Q. And may we see those, please?

A. Yes, sir.

Q. Is it permissible to have this page marked?

A. Yes, I will take it out for you.

(Defendant's Motion Exhibit 1, marked for identification.)

By Mr. Shenker:

Q. Judge, I have this which has been marked as Defendant's Motion Exhibit No. 1, and ask you to look at it and state what it is?

A. This is the original of my transcript in the proceeding based on a complaint against the defendant named Max Jaben. On the other side only appears my signature and the date this was made and the date that it was transmitted to the Clerk of the United States District Court.

Q. Now, does this one sheet on both sides constitute the entire record of the proceeding of your record that was made at the time the complaint was filed?

A. I would assume not, because I am under duty to send a copy of what I do daily to the United States Attorney's office, and a copy of it to the Marshal's office; and, Mr. Quinn there has the blue copies.

[fol. 5] Q. Very well.

(Defendant's Motion Exhibit 2 marked for identification.)

By Mr. Shenker:

Q. I show you what has been marked as Defendant's Motion Exhibit 2, and ask you if that is also a part of your records?

A. It is.

Q. Of what you did in this matter?

A. That is right.

Q. This Exhibit 2 consists of six pages, is that correct?

A. Well, now, of course, there is only four of the blue sheets that I mentioned as being my report to the United States Attorney. Now, the other two are something else.

Q. They do not relate to your record?

A. They might relate to my record, but we were speaking about my reports to the United States Attorney and the United States Marshal made daily.

Q. I will show you now Defendant's Motion Exhibit 2, and ask you to state how many pages it consists of and what they are?

A. There are four pages looking at the last page which was first in point of time. It shows the issuance of a summons on the 15th day of April, 1963, upon complaint made by David A. Thompson, Special Agent, in the Internal Revenue Service based on Section 7201 Internal Revenue [fol. 6] Code, and this means I handed it to the officers, that is, the United States Marshal a copy, which would be a yellow copy and a white copy, which would be the original to the United States Attorney on that date.

Q. You mean that notation, 4-15?

A. That means the day I handed it in. This is the day it occurred. It happens to be the same day.

Q. And the other pages what do they show?

A. This other page is dated May 11, 1963, it is also handed in on the same day, recites the hearing is continued to May 22, 1963 at 2:00 p. m. at the request of the Government.

Q. The next?

A. On the next page dated 5-22, 1963, and I omitted to put the date down here as I customarily do when it was handed in, the preliminary hearing was continued to the 29th day of May, 1963, at 2:00 p. m. and there is a question that I asked, what disposition should be made.

Q. I see, that is a question that you do ask in sending this document to the United States Attorney?

A. This is directed to the United States Attorney, this question.

Q. All right. Now, the other page?

A. The other page is dated June the 10th, 1963, and handed in June the 10th, 1963, and it also says, what dis-[fol. 7] position, and then it has here the communication from Mr. Millin as to what he wanted me to do.

Q. What was the communication?

A. That he wanted no further proceeding in it. Did not want it dismissed and asked that the transcript be sent to the Clerk's office, and I have 6-13-63, I think that is the date the transcript was sent to the Clerk's office.

Q. Now, this page here, is this also a part of your records?

A. Yes, it is.

Q. Now, when the United States Attorney asked you to send that transcript to the Clerk's office, were you talking then about a transcript which is contained in Exhibit 1?

A. That is it and here is the rest.

Q. And it has the recitation here, what it says, "At request of F. Russell Millin, U. S. Attorney, a transcript of all proceedings before your commissioner without a preliminary hearing or dismissal of the complaint is filed in the office of the Clerk of this Court."

A. That is correct.

Q. Now, this document that you have in your possession, what is that?

A. That is a letter from F. Russell Millin, U. S. Attorney to me asking—no, it isn't. It is a letter from Mr. F. Russell Millin to Mr. Max Jaben informing him of the continuance to May 22, 1963 at 2:00 p. m. in the preliminary [fol. 8] hearing before me. A copy was sent to me.

Q. You kept that in your record?

A. I kept it in my file.

Mr. Shenker: Would you mark this as an exhibit, please?

(Defendant's Motion Exhibit 3 marked for identification.)

By Mr. Shenker:

Q. Now, this which you have described as a letter from Mr. Millin to Jaben, of which you were sent a copy is identified as Defendant's Motion Exhibit 3?

A. Yes, it is.

Q. Now, is this a document that also came from your files?

A. Yes, it came from my files.

Q. What is that?

A. I believe that to be the carbon copy of the typewriting on the summons that I issued that day.

Q. That would be the carbon copy of the summons that you issued?

A. Not the full summons, but I mean the typewritten part of the summons.

Q. It is not complete?

A. It is not complete on its face, no.

Q. Now, do you have any other records or did you have any other records pertaining to this?

A. Pertaining to this complaint and this summons?

[fol. 9] Q. Yes?

A. Yes, I handed in to the Clerk of the Court some of the papers.

Q. Are they in the clerk's office now, do you know?

A. I don't know where the file is.

The Court: The file is up here, the clerk's file.

By Mr. Shenker:

Q. Would you please refer to this file and then select which ones of the documents you sent in to the clerk's office?

A. This document here is a copy of the transcript, the original transcript that is your Exhibit 1.

Mr. Shenker: May we remove those particular documents from the file so the witness can identify them?

The Court: Why don't you leave them in there and have them identified as they are? The Court will let him remark on the reports.

Mr. Shenker: As they are in the file.

By Mr. Shenker:

Q. You select which ones are the papers that you forwarded to the clerk's office.

A. This is my copy of the transcript, that is your Exhibit 1, and filed in the Clerk's office on June 13th, and there is the original summons, but I didn't give that to the clerk. I may have given that to the clerk, it may have come through me after it was served. It was served here in Kansas City. It probably came through me and I gave [fol. 10] that to the clerk, and here is the original complaint which I handed to the clerk. Of course, this bond is not in the transaction that you are talking about. This is a bond on the indictment.

Q. So the bond isn't yours. Were there any other papers that you sent over there?

A. This is a transcript on the indictment, so that is not in my file. This is the warrant on the indictment, so I sent that, but not in this transaction. This would bear another number.

Q. Now, this warrant, the copy of the paper that you identified as being the summons, isn't that the one that relates to the warrant on the indictment?

A. Well, let's compare it. This is my subpoena which I will put in my pocket. Let me make a comparison to the summons and I can answer your question. This is a carbon copy of the typewritten portion in the summons, not the warrant. This is the number of the case that matches this. This is not a copy of the warrant.

Q. This is not a copy of the warrant so this then was issued. When was this issued, on April the 15th?

A. Yes, that is correct.

Q. And, now, is there anything else then that relates to the transcript, that relates to your record pertaining to the transcript?

[fol. 11] A. They are no longer in my record, but they originated with me. Here is the original summons and then we had—there is the copy of the transcript that I filed with the clerk's office.

Mr. Shenker: Let me have these identified then.

(Defendant's Motion Exhibits 4, 5, and 6 marked for identification.)

By Mr. Shenker:

Q. I show you then, Defendant's Motion Exhibits 4, 5, and 6, and ask you if these are the documents about which you just testified?

A. Number 4 is the carbon copy of my transcript filed with the U. S. District Clerk, Mr. Truman, on June 13, 1963. Exhibit Number 5 is the original summons issued by me, and your Exhibit Number 6, is the original complaint filed before me.

Q. Now, do these, together with those you have previously identified from your files, does that constitute the entire record of the proceedings before you?

A. I believe it does. I think so.

Q. Now, Judge, do you recall the time of the day or night, Mr. Thompson appeared before you?

A. I don't recall. It wasn't at night.

Q. It was in the day time?

[fol. 12] A. It was in the day time but I can't tell you what time of day.

Q. Do you recall just what you did at the time, if anything?

A. I recall I think, yes, what I did.

Q. Will you tell us, please?

A. Well, Mr. Thompson accompanied by Mr. Featherstone, came to my office with a complaint, the complaint that is in the court file, and I don't from my own personal memory remember this, but I am informed they didn't bring a summons with them, and borrowed a summons from me, and went and had a summons prepared and brought it back to my office. The first thing I do when a complaint is presented to me is to give it a number, which in this case was Docket No. 27 Case No. 229, so I wrote the numbers in. I read the complaint and decided it was sufficient, and signed my name to the summons.

Q. Is that everything that took place there?

A. No, that wasn't everything. A copy of the complaint, carbon copy I am sure was prepared and I certified with

a rubber stamp certification and my signature it was a true copy of the original, then the original summons and the certified copy which would be a carbon copy of the complaint was taken by either Mr. Thompson or Mr. Featherstone to the Marshal's office.

Q. That was all that took place at that time?

[fol. 13] A. At that time, yes.

OFFERS IN EVIDENCE

Mr. Shenker: I believe that is all of this witness. I would like to offer into evidence, if the Court please, the Defendant's Motion Exhibits 1 to 6 inclusive.

The Court: Admitted in evidence.

(Defendant's Motion Exhibits 1 to 6 inclusive, received in evidence.)

Mr. Hansen: No questions, your Honor.

The Court: Do you want the witness any more?

Mr. Shenker: No.

The Court: You will be available.

Mr. Cisel: I will either be at my office or in the Commissioner's office.

Mr. Shenker: Judge, we are keeping these exhibits here perhaps by agreement.

Mr. Cisel: After your hearing I will get them back?

Mr. Shenker: We can do that, we would arrange to have photostats made.

Mr. Cisel: My record will be incomplete.

Mr. Shenker: Is it agreeable that we might substitute photostats of this, to have the clerk do so?

The Court: Yes, that will be all right.

Mr. Shenker: We will do that, thank you very much.

(Witness excused.)

[fol. 14] DAVID A. THOMPSON being produced, sworn and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Shenker:

Q. Will you please state your name?

A. David A. Thompson.

Q. And your occupation?

A. I am a special agent, Intelligence Division, Internal Revenue Service, Kansas City.

Q. For how long have you been engaged in that capacity?

A. For approximately ten years.

Q. Now, I will ask you, Mr. Thompson, I will show you that which has been identified as Defendant's Motion Exhibit 6, and ask you to state if that contains your signature?

A. It does.

Q. That is the complaint. Now, Mr. Thompson, in that document you state that you consulted—do you have a copy of that document?

A. Not with me, no.

Q. In that document, sir, you state that you consulted private records reflecting the taxpayer's income. Right?

A. Yes, sir.

Q. Will you tell us what private records you saw?

Mr. Hansen: To which we object. Your Honor, Mr. [fol. 15] Shenker is seeking to go into the matter of probable cause for the issuance of the summons on complaint. We respectfully submit that the question of probable cause must be determined from the complaint itself received before the Commissioner, and several courts, including the Court of Appeals for this circuit have held that once an indictment has been returned, as has occurred in this case, that the question of probable cause is not open to question after that, except as regards the sufficiency of the complaint itself.

The Court: I am seeking light, gentlemen. Where you have the situation you have here, if the complaint was invalid, what is the situation then?

Mr. Shenker: That is exactly the reason we contend that we are entitled to that information.

The Court: In other words, you have a deadline, gentlemen, if the complaint was invalid, there would be no justification for issuing the summons. Then the statute has run and your indictment would be barred by the statute of limitations.

Mr. Hansen: That is correct, sir.

The Court: Under those circumstances, I am not prepared to state at this moment, without investigation, the matter has never been before me, no decision on the matter. I think you have a situation here that is different than the [fol. 16] ordinary proceeding. Certainly after the summons has been issued, the complaint has been filed and the summons has been issued, and thereafter an indictment is returned, the proceedings are *functus officio*. They have served the purpose of tolling the statute of limitations, but if that proceeding be invalid, then the subsequent action of the grand jury in returning an indictment which would otherwise be barred by the statute of limitations—that is the question that is presented by you gentlemen, and I am frank to say that to me it is a new situation. That is one of the vices of waiting until the last minute, as so often happens, by the Department of Revenue, the last hour of the last minute, the last minute of the last day to file these things.

It has happened before, but I haven't seen the section raised. I am going to admit it, gentlemen. I don't see what harm it can do. I think it is a matter that we will have to meet ultimately, so I think we just as well meet it head on, gentlemen, and see where we are going with it.

Mr. Hansen: I don't understand what the purpose of Mr. Shenker's question is. I don't understand where he intends to go in this examination.

The Court: I don't know either. I can anticipate up to [fol. 17] a certain point, but beyond that I cannot.

Mr. Hansen: Of course, the Government is very much opposed to Mr. Shenker bringing out who the witnesses are in this case.

The Court: I shall not permit that to be done, gentlemen. That will come up on another matter. He is asking what record he saw. I think that is as far as his question goes.

So far as the witness is concerned, we are going to get at that on a subsequent proceeding and subsequent motion here.

By Mr. Shenker:

Q. Mr. Thompson, do you recall the question?

A. Just what private record.

Q. Yes, what private records you saw pertaining to the taxpayer's income, which you say in here that you saw private records reflecting the said taxpayer's income. My question is, what private record you saw reflecting the taxpayer's income?

Mr. Millin: The Government objects to that question. It is like asking for the name of witnesses here, getting into the Government's case.

The Court: Overruled.

A. I saw partnership records of various partnerships that were reflected on the taxpayer's income tax return. I looked at those records.

[fol. 18] Q. Any others?

A. And if I understand the meaning of the term, "private", this would probably cover that field.

Q. Beg pardon?

A. This is a matter of interpretation for me what is private records. This is all I can interpret from that. I looked at lots of records but private records, I am not sure I understand what you mean.

Q. Well, the word "private" record was used by you in the complaint, isn't that right?

A. Yes.

Q. I had nothing to do with the preparation.

A. I interpreted it that way in this too.

Q. So what did you include on that then?

A. Well, the partnership record is what I would include on that.

Q. Partnership records?

A. Yes, sir.

Q. Anything else?

A. That would be all.

Q. All right, now, what partnership records were there?

A. There were partnerships involving the Baltimore Avenue Association, the Holmes Hotel, the Main Street Investment Company, 1122 Penn Building Company, the Midwest Exchange.

Q. You said the Baltimore Avenue Association, Main Street Investment Company, what was the next one?

[fol. 19] A. 1122 Penn Building Company, Holmes Hotel. Did I name five?

Mr. Quinn: Just four.

By Mr. Shenker:

Q. You mentioned something about a Midwest?

A. Midwest Exchange.

Q. That makes the five. That is all the private records, and all of the records that you had in mind when you said you examined private records?

A. These are the records that I personally looked at.

Q. Now, where did you examine those records?

The Court: Now, gentlemen, the objection has been made. I think solely the question before this Court is the basis for this witness' affidavit made before the Commissioner to justify the issuance of the summons. Anything that he saw that gave to him the justification of the statement that he made, I think is sufficient. He saw those records. We are not going to get into the whole field. I am going to sustain the objection, beyond what you have gone into.

Mr. Quinn: It would seem to make a difference from the legal standpoint if the defendant filed these reports

with the Government, or if the partnerships filed them with the Government, and Mr. Thompson examined them in the files of the Government.

The Court: What difference does it make? If the records indicated there has been failure to pay a tax on income, [fol. 20] he was justified in making the affidavit. I don't see as it makes any difference whether he examined them in the alley or in the Income Revenue Department, if the record indicated to him there had been a violation of the Internal Revenue law sufficient to base an affidavit. I think that is all that is necessary. You don't have to go into all of the details. If you want to make a record on it, go ahead.

Mr. Shenker: I think the question that I asked was premature. I would like to ask a different question, if the Court please.

By Mr. Shenker:

Q. Did you say you examined those records, you are talking about returns, or talking about records?

A. Records.

Q. I see. You testified that you interviewed third persons having knowledge of the taxpayer's financial condition. Can you tell us whom you interviewed?

Mr. Hansen: We object to that.

The Court: The objection is sustained. Now, gentlemen, we are not going to try this case, we are simply going to try the sufficiency of the affidavit and the fact that this man had grounds to make the statement that he made. We are not going to go into the question of witnesses, whether he had a right to rely on them. I don't think the law goes that far, for the signing of the affidavit.

[fol. 21] Mr. Shenker: Of course, the question is this, your Honor, that unless we know who he talked with, the Court is not in a position to determine whether he had reasonable ground to rely on those people or not, or whether those people had knowledge of it.

I might say, your Honor, that the best way to really prove it would be—and I didn't get to that point as yet,

is to produce the report that they wrote in connection with this case which would then show who they talked with, and the information, if any, he got from them.

The Court: I am not going to require him to reveal the names of those witnesses at this time, gentlemen.

By Mr. Shenker:

Q. Now, I will ask you this, Mr. Thompson, did you write a report on this case prior to the time that the complaint was filed?

A. Yes, sir.

Q. You did. Do you have that report?

A. Yes, sir.

Q. May I see it?

Mr. Hansen: If the Court please, we object.

The Court: The objection is sustained.

By Mr. Shenker:

Q. That report would contain the persons that you spoke with, the identity of the persons that you spoke with and what they said, is that correct?

A. Yes, sir.

Q. And it will contain the information on which you acted, is that correct?

A. Yes, sir.

[fol. 22] Mr. Shenker: May we request it, we have previously issued a subpoena requesting that the report may be produced in order that we may determine as to whether or not probable cause existed for the filing of this complaint.

Mr. Hansen: To which we object.

The Court: The objection is sustained. Gentlemen, I don't believe the law requires the Court to go into all of the reasons and ramifications for the making of an affidavit for the summons. I don't believe it does. I think there must be some justification for it, but I think if we do that, the Court would spend half of its time inquiring into the question of whether the agent had reasonable cause to request the issuance of a summons.

We just as well settle it right now. I am not going to do it. The objection is sustained.

I might say for the purpose of clarifying the Court's statement, the question is whether or not the Commissioner was justified in issuing the summons upon the statement that was then before him. Am I correct in that?

Mr. Shenker: That is correct, your Honor.

The Court: Now, gentlemen, the Commissioner—the agent comes in asking for a summons, a warrant, and he says he has information about a matter, that he has investigated it, do you think it is necessary that the Com-
[fol. 23] missioner say, "Who did you talk to"? In other words, does the Commissioner have to try the issue to determine whether or not the agent's information is sufficient upon which to base or issue the summons?

Now, it is my thought that he doesn't have to do that. If the agent comes in and says, "I have investigated the matter and have certain things he has done", and makes the oath and affidavit to that effect, I think that is sufficient upon which to issue the summons. It depends upon whether or not the matter that was set out in the affidavit was sufficient.

Now, I think that is the issue. Now, where did you get them? He doesn't have to try that issue. If it were otherwise, the Commissioner would have to say, "I don't believe he did that", or, "Are those people reputable"?

Now, I think it is a little different situation where you have probably an application for a search warrant, the police officer relies upon the statement of a stool pigeon or an informer or something of that kind, it might be well to ask him questions before and secure information, "Have you been able to rely upon the information he has given to you heretofore?" I don't think it is a comparable situation. That is the Court's reason for excluding this testimony. It isn't what this Court thinks about it. It is whether or not the Commissioner was justified at the time the in-
[fol. 24] formation was taken before him in issuing and signing the summons.

I think the information that he examined the books, I think that is probably competent, but to go out into the

broad field, I don't think that is competent. That is the basis for the Court's action now.

By Mr. Shenker:

Q. Mr. Thompson, when did this investigation of Mr. Jaben begin?

A. About April, 1961.

Q. April of 1961?

A. Yes, approximately. Now, I would like to clarify that a little bit. That is when my interest in the case began.

Q. I see. In other words, you are the special agent and you came in in April, 1961?

A. That is right. There has been an investigation before that.

Q. Was your office in it before that time?

A. No.

Q. Now, when did the general agents begin the investigation?

A. This I have no personal knowledge of.

Q. Would the record show that?

A. Our records probably don't.

Q. Your records probably don't show it. To be exact, Mr. Thompson, or as close to being exact as you can be, do you know about when you wrote your report in connection with this investigation?

[fol. 25] Mr. Millin: If I understand the Court's ruling, this is the question we objected to as immaterial and irrelevant to the issues.

The Court: This isn't the question. The question he asked a moment ago was what was in the report and to produce the report. Now he is asking when it was written.

I anticipate Mr. Shenker; if I recall he has raised the question in one of his motions, well if there is such a thing as laches, but the theory is that you slept on your rights, waited until the last minute and therefore, you ought not to be permitted to prosecute then. That is the theory. Now, I disagree with Mr. Shenker about that, but I think he ought to be permitted to make the record on that.

In my opinion, the Government has a right to file the information up until, as I said, the last minute of the

last day before the statute of limitations runs, and it seems to be the law, if I understand that, to file an information tolls the statute of limitations.

Now, if Mr. Shenker has a theory that that isn't the law, I think he ought to be allowed to make the record. When we get to the proper place, the Court will entertain objections, but I will permit him to make the record. Generally, that is your theory, Mr. Shenker, am I correct in that?

Mr. Shenker: That is correct, your Honor.

[fol. 26] The Court: Of course, the Court is anticipating him. We will see where he goes.

I assume, gentlemen, that there really isn't any dispute about this matter, is there? The matter has been under investigation for a long time, several years? The Court doesn't go by rumors, but it has been rumored for a long time it was under investigation.

Mr. Shenker: That is my understanding.

The Court: Probably for several years, I don't know. It has been a long time at any rate, that is only rumor, I know nothing about it, but I suspect the Government would probably be willing to stipulate it has been under investigation for whatever time it has been under investigation, I don't know. If you want to make your record, I want you to do it.

Mr. Shenker: Of course, if the Government will tell me when it started and when they wrote the report, that is all my question is at this time.

The Court: The Court will permit that to be done just solely for the purpose of making your record, but not what is in the report. So, if you know, Mr. Thompson, when the report was written, you may so state.

A. I believe it was January of 1963. I think in fact, it was January the 11th, when it was completed.

By Mr. Shenker:

Q. To the best of your recollection, it was January 11, [fol. 27] 1963, that you wrote the report?

A. That it was completed. It takes a long time to write one of those reports.

(Defendant's Motion Exhibit No. 7 marked for identification.)

By Mr. Shenker:

Q. I will show you, Mr. Thompson, that which has been marked as Defendant's Motion Exhibit No. 7, and ask you to state if you are familiar with that letter?

A. I don't specifically recall seeing this before.

Q. Would you say you are not familiar with it?

A. I don't recall seeing it before, no, sir.

Mr. Shenker: Will the Government stipulate that is a letter from the Justice Department?

Mr. Hansen: Yes, sir.

OFFER IN EVIDENCE, OBJECTION THERETO SUSTAINED

Mr. Shenker: Very well, it can be stipulated, if the Court please, by counsel that this Defendant's Exhibit 7 was a letter addressed to the defendant by the Justice Department, February the 12th, 1963, and that it is signed, Louis F. Oberdorfer, Assistant Attorney General, Tax Division, by Fred G. Folson, Chief Criminal Section of the Tax Division. We would like to offer Defendant's Motion Exhibit No. 7 into evidence.

Mr. Hansen: To which the Government objects on the ground that it is irrelevant and immaterial.

The Court: Gentlemen, the objection will be sustained, [fol. 28] except as to the fact it is dated February 12, 1963, the objection will be sustained.

Mr. Shenker: No additional offer of proof is necessary since this is a document?

The Court: No, the objection is sustained, except as to the fact it is dated February 12, 1963, and hasn't anything to do with the length of time the matter has been under investigation. So, it is purely a current letter.

Mr. Shenker: The purpose of it, your Honor, the reason for the offer of this letter is that this is subsequent to the

report that was written by this witness who was the agent in charge of the investigation.

The Court: The objection is sustained.

Mr. Shenker: This is all, if the Court please, I have of this witness in view of the Court's ruling, in support of the Motion to Dismiss.

We do need him in support of the Motion to Suppress, but I thought I would stop now.

The Court: Any questions?

Mr. Hansen: No questions by the Government.

The Court: That is all, thank you, Mr. Thompson.

Mr. Shenker: Shall we argue the Motion to Dismiss now, if the Court please?

The Court: No, let's go on with the rest of it. Let's get through with the testimony and then you can argue it.

[fol. 29] Mr. Shenker: This is a different motion. This is evidence, if the Court please, that we intend to offer in support of the Motions to Suppress the evidence.

By Mr. Shenker:

Q. You are the same Mr. Thompson who testified a few minutes ago?

A. Yes.

Q. Mr. Thompson, I will ask you to state if you had occasions to obtain books and records of any partnerships in which the defendant appeared as a partner? I am talking about books and record or documents?

A. Yes, sir.

Q. You have, and I will ask you to state, sir, which books and records did you obtain?

Mr. Hansen: The Government objects, your Honor, to the allegations of the motion. They are pointed in no direction at all. I don't think the allegations of the Motion to Suppress are sufficient to support an exploratory examination into what the witness did here.

Mr. Shenker: Well, this is not asking, if the Court please, the contents of the books and records. This is asking the witness if he obtained those and under what circumstances he obtained them, it being our contention that they were

improperly obtained, and therefore, they should be suppressed.

The Court: Suppose we hear the testimony. Overruled. [fol. 30] We are not going into the question of what is in the books. We are going into the question of what the books are and how they were obtained, solely for determining that issue.

By Mr. Shenker:

Q. Do you remember the last question?

A. It is difficult for me to answer in the way that the question is phrased, because in most instances I didn't obtain them. I looked at them as stated in the complaint, but I have to say that actually obtaining records myself, I obtained very few. Let me think which ones I did.

Mr. Millin: The motion which was filed talks about the documents and objects that were obtained from the defendant. The question that he asked is broader than the document that he filed.

The Court: I assumed they were from the defendant.

A. No, I obtained nothing from the defendant. I misunderstood the question.

By Mr. Shenker:

Q. I think that my question didn't limit it to obtaining it from the defendant. My question was predicated on your testimony that the previous motion wherein you stated that you examined books and records relating to partnerships in which the defendant was a partner, and my question now is, again, in support of my Motion to Suppress, what books and records you examined and where you did examine them that related to partnerships in which the defendant is [fol. 31] a partner.

A. I looked at the records of the Holmes Hotel and the Midwest Exchange in the offices of Abe Rosenbaum.

Q. Who is that?

A. Abe Rosenbaum, Certified Public Accountant.

The Court: What hotel?

The Witness: Holmes Hotel and Midwest Exchange.

The Court: In the office of whom?

The Witness: Abe Rosenbaum, a Certified Public Accountant. I looked at a record of sorts.

By Mr. Shenker:

Q. What?

A. I looked at a record of sorts consisting mainly of one piece of paper in the office of Norris Clark, a CPA, accountant for Mr. Phil Madeo that related to the Main Street Investment Company.

Q. Was the defendant given as one of the partners in that?

A. Yes. I looked at the record pertaining to the 1122 Penn Building Company in the Intelligence Division office, said records were obtained by another agent.

Q. Now, was that an agent of the Intelligence Division?

A. No, sir.

Q. It was a revenue agent?

A. I would have to qualify that, to my knowledge. It could have been a special agent involved in that, but to my knowledge it was a revenue agent.

[fol. 32] Q. Do you know where they got that record or those records?

A. Which property was I referred to?

Q. That is the 1122 Penn Building Company.

A. I have no personal knowledge of where they got that. I think as I recall, it was from Mr. Presta, from Mr. Presta's office.

Q. You don't know where it was gotten?

A. I am not sure, no, sir.

Q. And do you know what agent, the name of the agent that obtained that?

A. M. K. Concannon.

Q. That is the 1122 Penn, is that right?

A. That is right.

Q. All right, any other records?

A. I would first like to state that I am not positive it was Concannon. I know it was a revenue agent, I don't recall for sure.

Q. Your record would show that, isn't that right?
A. Probably.
Q. Do you mind referring to your report to see if you can enlighten me on this?

Mr. Hansen: I think it is all immaterial.
The Court: Yes, I think so too. I don't think there has been anything showing who it was obtained it. Even if they had been obtained from somebody, that somebody [fol. 33] else is not a party to this litigation.
Mr. Shenker: I can't show it all at one time, your Honor.

By Mr. Shenker:

Q. All right, any others?
A. The Baltimore Avenue Association records were in the files of the Intelligence Division when I looked at them.
Q. Do you know who obtained those and from whom?
A. No, I don't. I don't recall at the time.
Q. Your report would show, isn't that right?
A. I don't think so.
Q. In other words, you don't think that your report would show as to who obtained those records and where they obtained them?
A. No, sir, because the Baltimore Avenue Association record pertained to various cases being worked by this office, and I had access to looking at them like other agents did, and I saw no reason why I should write the story.
Q. But somewheres in your file it would show?
A. Someone probably has a record of it, yes, sir.
Q. All right, any other records?
A. I believe I have covered all of the partnerships, didn't I? Did I leave out a partnership?
Q. I can't say, I am not familiar with it.
A. There are five partnerships.
Q. You mentioned five.

[fol. 34] The Court: Yes, he mentioned five.

By Mr. Shenker:

Q. Now, when you examined the record of the Holmes Hotel and of the Midwest Exchange, did you have permission of Mr. Jaben to examine those records?

A. I had an oral admission, yes, sir.

Q. Permission or admission, which is it?

A. He made the statement in an interview that he referred us to Mr. Presta to see about certain records of the partnership and he also said, "You are welcome to look at the record on these partnerships", and that is what we did.

Q. Just a broad statement like that, is that right?

A. I don't think it was very broad because I covered each item specifically and specifically he made this statement to me as pertains to each partnership.

Q. Was Mr. Jaben present at the time you examined that?

A. No, sir, he was not.

Q. Did you make any copies of them?

A. Yes, sir, we did.

Q. Photostatic copies?

A. Photostatic and transcripts,—true copies.

Q. And you have those?

A. Yes, sir, we do have.

Q. Now, with reference to the records of the Main Street Investment Company, did you have a subpoena for the examination of those records pertaining to the Holmes [fol. 35] Hotel and Midwest Exchange at that time?

A. I believe subpoenas were issued in all these cases.

Q. Was that prior to the time you looked at them, or after you looked at them?

A. Prior.

Q. Prior to the time you looked at them?

A. Yes, sir.

Q. And now the record of the Main Street Investment Company that you said that you examined in the office of Norris Clark, a CPA. Was Mr. Jaben present at that time?

A. No, sir.

Q. And did you have any written authority to examine those records?

A. I believe we issued a subpoena in that case too.

Q. And did you make copies of those records?

A. Yes, sir.

Q. Photostatic copies as well?

A. A photostatic copy as I recall.

Q. Now, with reference to the 1122 Penn Building Company, is that the name?

A. That is the way I recollect, 1122 Penn Building Company.

Q. Now, with reference to those records, you said that they were in the Intelligence Division's office, is that correct, that they were obtained by some other agent?

A. I think I stated they were obtained by another agent, yes.

[fol. 36] Q. You knew of no circumstances under which they were obtained?

A. No, sir, not of personal knowledge.

Q. And did you make use of them?

A. Yes, sir, I did.

Q. The same thing is true of the other records about which I questioned you, you made use of them?

A. Yes, sir.

Q. And is the same thing true with reference to the Baltimore Avenue Association?

A. I don't believe so, this is recollection, but the Baltimore Avenue Association records were used primarily for verification of income shown on the taxpayer's return. I don't believe I made any copies of anything that would be pertinent to the tax case.

Q. But they were used by you?

A. I looked at them, yes.

Q. Now, were there any other records which you consider private that you examined or obtained or made copies of?

Mr. Millin: That is beyond the scope of the motion he has filed, if your Honor, please.

The Court: Overruled.

A. I believe that is all I can recall right now. I think that is it.

By Mr. Shenker:

Q. I believe you testified that the defendant was not present at the time any of those records were examined?

[fol. 37] A. That is correct.

Q. By you?

A. That is correct.

Q. Did you show the defendant any of those records?

A. No, sir.

Q. I believe you testified that Mr. Concannon might have been the one that got the 1122 Penn Building Company records. Do you know how long Mr. Concannon was investigating the case prior to the time you came in?

A. I can give you a guess. My recollection. I don't know exactly. Six months probably.

Q. That is purely a guess?

A. He was assigned the case, investigating that long I would say, not for that, but assigned, yes, but we will often times get an assignment and won't do much with it.

Q. You say it is purely a guess?

A. He did some work for maybe six months. I don't know, maybe longer. I can't answer that.

Mr. Shenker: I believe that is all.

Examination.

By the Court:

Q. May I inquire, Mr. Thompson, if you know from the records you examined of these five companies or whatever they are, corporations or partnerships?

A. Yes, sir, most of them are partnership, the Baltimore [fol. 38] Avenue Association at one time was a corporation, and so was the Midwest Exchange incorporated. Just exactly when they were changed from partnerships to corporations, I would have to check. Most of them were partnerships though.

Direct examination.

By Mr. Shenker:

Q. Let me just ask you, just one more question that I can think of. Did you examine any records in the office of the Prosecuting Attorney for Kansas City?

Mr. Hansen: For which we object, it is irrelevant and immaterial.

The Court: Overruled.

A. One thing I don't believe, I want to amend one statement. I am not sure the Baltimore Avenue was ever incorporated. I think maybe that was always a partnership.

The Court: Now, the question is asked you, did you investigate any of them in the Prosecuting Attorney's office?

A. No, I did not investigate records in the Prosecuting Attorney's office.

By Mr. Shenker:

Q. Did you look at any records in the Prosecuting Attorney's office that reflected the activities of the defendant?

The Court: You are referring to the Prosecuting Attor-
[fol. 39] ney of Jackson County?

Mr. Shenker: That is right.

A. Excuse me. Yes. Before I thought you meant the U. S. Prosecuting Attorney.

Q. No, the county.

A. The Baltimore Avenue Association records were there and I think I did look at them, a cursory look at one time.

Q. Any other records?

A. No, sir.

Q. Make any notes?

A. Not in his office, no, sir.

Q. Were you only looking at those records in the Prosecuting Attorney's office in Jackson County just one time, is that the idea?

A. One time is all I recall. I looked at them later at our office.

Q. Oh, you did look at them. How much later?

A. I don't recall. Sometime later I don't recall exactly.

Q. Did you see any other records in which the partnership or the individual in which the defendant was a partner in addition to the Baltimore Avenue Association records?

A. No, sir.

Q. But you recall at least twice you went in and looked at them?

A. Once at the Prosecuting Attorney's office.

Q. I thought you said that you looked at them later, but [fol. 40] not in the Prosecuting Attorney's office?

A. No, sir, once is all I recall there.

Q. Did you take any record from the Prosecuting Attorney's office?

A. I think some of those records were taken up for photostating because we had some copies, but I didn't do it personally. I don't know how we got hold of the records. I don't know, but if I had anything to do with it I don't recall it at this time.

Q. But your office was?

A. We had copies of the records and I don't recall how we got them now.

Q. In other words, it was done either by you or members of your office?

A. Yes.

Q. I see. You don't recall any particular individual in your office?

A. No, I don't recall the exact time and exactly how it was done.

Mr. Shenker: My bosses tell me that is all, your Honor.

The Court: The time to quit is when the bosses say so.

Mr. Hansen: No questions.

The Court: That is all, thank you, Mr. Thompson.

[fol. 41] Mr. Shenker: If the Court please, in view of the testimony of this witness, I am certain that we should like to renew our request for the report that was made by this witness with reference to these investigations, and also in support of the Motion to Suppress the evidence.

Mr. Hansen: The Government objects.

The Court: The objection is sustained.

Mr. Shenker: May we have, if the Court please, about three minutes, I want to confer.

The Court: Yes, we will take a little recess.

Whereupon, a recess was taken.

After the recess, the following proceedings were had and entered of record:

Mr. Shenker: If the Court please, we have two more questions from Mr. Thompson.

By Mr. Shenker:

Q. Mr. Thompson, the records that you examined in the Prosecuting Attorney's office, that was before January the 11th, 1963, before you wrote your report?

A. That is correct.

Q. And then do you know whether or not a subpoena was issued for those records to the Prosecuting Attorney's office?

A. No, sir, I don't know.

Q. Well, you had no subpoena when you went there to examine them?

A. I don't recall.

Q. Well, do you know whether you went to the United [fol. 42] States Attorney's office and requested a subpoena?

A. We don't do that, sir. I have the authority to issue one myself.

Q. Do you know whether you issued one?

A. I don't think so. I don't recall, though.

Q. Your report would show whether you did or not?

A. My report won't show, but I might have something in the file.

Q. Your file would show whether you did or not?

A. It would show whether I did, if there is one in there.

Q. That is what I say, that is correct, it would show whether you did, but to the best of your recollection, you believe there was no subpoena?

A. I don't believe so. Not for my part.

Mr. Shenker: That is all.

Mr. Hansen: That is all.

(Witness excused.)

* * * * * * *

[fol. 42a] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 43] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 21547-3

UNITED STATES OF AMERICA, Plaintiff,

vs.

MAX JABEN, Defendant.

MEMORANDUM AND ORDER—September 4, 1963

On May 17, 1963, the Federal Grand Jury returned an indictment in three counts against the defendant, in this Court. In the first count it is charged:

"That on or about the 16th day of April, 1957, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $17,665.31 and that the amount of tax due and owing thereon was the sum of $6,017.32, whereas, as he then and there will knew, his taxable income for the said calendar year was the sum of $40,001.76, upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C., Section 7201."

[fol. 44] .In the second count it is charged:

"That on or about the 15th day of April, 1958, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, did wilfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue for the Internal Revenue Collection District of Kansas City, Missouri, at Kansas City, Missouri, a Form 1040 United States Individual Income Tax Return for the calendar year 1957, which was verified by a written declaration that it was made under the penalties of perjury, which said Form 1040 United States Individual Income Tax Return for the calendar year 1957 he did not believe to be true and correct as to every material matter in that in the said Form 1040 United States Individual Income Tax Return for the calendar year 1957 he stated that his taxable income for the calendar year 1957 was the sum of $22,370.02 and that the amount of tax due and owing thereon was the sum of $7,364.60, whereas, as he then and there well knew and believed he had during calendar year 1957 received taxable income of $25,466.47 upon which said taxable income he owed to the United States of America an income tax of $7,430.58.

In violation of Section 7206(1), Internal Revenue Code; 26 U. S. C., Section 7206(1)."

In the third count it is charged:

"That on or about the 13th day of July, 1959, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, who during the calendar year 1958 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1958, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated

that their taxable income for said calendar year was the sum of $14,020.13 and that the amount of tax due and owing thereon was the sum of $3,333.64, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $24,039.46, upon which said taxable income there was owing to the United States of America an income tax of $6,816.97.

[fol. 45] In violation of Section 7201, Internal Revenue Code; 26 U. S. C., Section 7201."

The defendant has filed Motion to Dismiss the indictment on the ground that:

"1. The indictment is vague, indefinite and duplicitous; it fails adequately to inform the defendant of the charges against him, as required by the Sixth Amendment to the Federal Constitution; the indictment fails to allege all of the elements of the offenses attempted to be charged; it would not bar a subsequent prosecution for the same offense; and it deprives the defendant of the right to be charged by a grand jury, in that, the language is so general it would allow the Government to secure a conviction of the defendant based upon facts not found by, and perhaps not even presented to, the grand jury which indicted him."

I am unable to find anything indefinite or duplicitous in the indictment, or that it fails to adequately advise the defendant of the nature of the charge against him. It clearly alleges the nature of the offense and would be a bar to any subsequent prosecution for the same offense.

The second ground of the motion is that Count I of the indictment is barred by the six year statute of limitations, and that the filing of the complaint on April 15, 1963, did not toll the running of the statute.

The third ground alleges that the Government is guilty of laches and unnecessary delay in the filing of the complaint and presenting the case to the grand jury, and that:

[fol. 46] "* * * and as a result, defendant was denied his right to a 'speedy trial' under the Sixth Amend-

ment to the Federal Constitution; and further, the unnecessary delay on the part of the Government was in violation of Rule 48(b) of the Federal Rules of Criminal Procedure."

Clearly, the complaint was filed within the statutory period. It is not an uncommon practice on the part of the Government to delay the filing of a case to the last minute. A complaint or charge may be filed any time within the statutory period.

The filing of a complaint before the Commissioner within the period of limitation has the effect of tolling the statute, and a conviction obtained under an indictment returned thereafter is not barred by the statute of limitations. 26 U.S.C.A., §6531; *Zacher* v. *U. S.*, 227 F. 2d 219 (C. A. 8, 1955); *U. S.* v. *DeHardit*, 120 F. S. 110 (E.D.Va. 1954).

The question of whether or not one charged with an offense has been denied a speedy trial must be considered from the time of the filing of the charge, and not from the period from which it could be charged within the period of limitation.

Upon oral argument, the defendant strenuously urged that the affidavit upon which the complaint was issued was not sufficient to justify issuance of the summons by the Commissioner.

[fol. 47] The significance of this issue, of course, is that if the complaint was insufficient, then the statute of limitations was not tolled, and an indictment thereafter returned by a grand jury would be barred by the six year statute of limitations.

The affidavit was signed by a special agent of the Internal Revenue Service, who stated that he had conducted an investigation into the income tax liability of the defendant for the year in controversy by examining the defendant taxpayer's tax returns for the year 1956 and other years, by identifying and interviewing third parties with whom said taxpayer did business, by consulting private and public records and by interviewing third persons having knowledge of the taxpayer's financial condition.

He stated that he had personal knowledge that the defendant did unlawfully and illegally evade and defeat the

income tax due and owing by him to the United States for the year 1956, by causing to be filed and filing with the District Director of Internal Revenue at Kansas City, the false and fraudulent income tax return.

On examination at the hearing on these motions, the agent testified that he had examined the books and records of the defendant, that they were made available to him and that it was from that information that he stated he was familiar with and knew of the matters or facts to which he made oath.

[fol. 48] Apparently the agent had access to the books and records and documents which will be used by the Government in attempting to prove its case, and obtained the books and records of the defendant indicating the source of his income.

The statements contained in the complaint were based on information developed in the investigation conducted by the special agent who swore to the complaint. The factual situation here is not the same as that in *U. S.* v. *Langsdale*, 115 F. S. 489 (W. D. Mo. 1953) decided by this court, but is similar to that in *U. S.* v. *Black*, 216 F. S. 645 (W. D. Mo. 1963) where a substantially similar complaint was approved by Judge Oliver of this Court. It is also in compliance with the teachings of *Giordinello* v. *U. S.*, 357 U. S. 480 and *Jones* v. *U. S.*, 362 U. S. 257.

The Motion to Dismiss is therefore overruled.

Defendant has also filed Motion for Bill of Particulars, in which he seeks a great mass of information, to some of which he is entitled, and some not. Without describing in detail the information sought by the defendant, suffice it to say that by limited bill of particulars the Government advised that it would proceed under the net worth and non-deductible cash expenditures theory in submitting its case, and on oral argument supplied the amount it claims as defendant's opening net worth.

[fol. 49] Under those circumstances, the Government will be required to furnish to the defendant, the sources from which the net worth was increased, categorized as to item and the deductions allowed to determine the earned net income for each calendar year.

With the above exception, the Motion for Bill of Particulars is overruled.

The defendant has also caused a subpoena to be issued directed to F. Russell Millin, United States Attorney, directing the production of:

> "1. All books, papers, documents and objects obtained from defendant or others by seizure or by process.
>
> 2. All books, papers, documents and objects obtained by the Government from others which the Government presented to the Grand Jury, expects to use at the trial, or is material to the trial or defense of this case.
>
> 3. All memoranda of any and all statements allegedly given by the defendant to Government agents, including letters, interviews, admissions or confessions."

A subpoena was also directed to David A. Thompson, the special agent who made the investigation directing the production of:

"1. All records or papers pertaining to the above case.

2. All statements and testimony made before the Grand Jury which indicted the defendant, and records and papers used in the testimony.

3. Special Agent's Reports and Revenue Agent's Reports".

[fol. 50] The Government has filed Motions to Quash the Subpoenas. The Government should be required to make available to the defendant, all books, papers, documents and objects obtained from the defendant or others seized pursuant to any process and not returned to the defendant or to others from whom they were obtained.

Any such books, documents and objects should be made available to the defendant in the office of the Clerk of this court for inspection, copying and photographing. This shall include all books, documents and papers obtained from others which the Government presented to the Grand Jury.

and expects to use at the trial if such items have not been returned by the Government to the sources from which they were obtained.

The subpoenas will be quashed as to all other matters requested.

This ruling also disposes of all matters raised in defendant's Motion to Produce and Motion for Discovery.

Defendant's Motion to Suppress Evidence was overruled in open court after reception of evidence and argument.

It Is So Ordered!

Richard M. Duncan, Judge.

Dated: September 4, 1963

[fol. 51] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

No. 21547

[Title omitted]

SUPPLEMENTAL MOTION TO DISMISS THE INDICTMENT—Filed November 1, 1963

Comes now the defendant and moves the Court for an order dismissing the indictment herein, and as grounds for said motion states and alleges the following:

1. The indictment and each count is vague, indefinite and duplicitous; it fails adequately to inform the defendant of the charges against him, as required by the Sixth Amendment to the Federal Constitution; the indictment fails to allege all of the elements of the offenses attempted to be charged; it would not bar a subsequent prosecution for the same offense; it deprives the defendant of the right to be charged by a grand jury, in that, the language is so general it would allow the Government to secure a conviction of the defendant based upon facts not found by, and per-

haps not even presented to, the grand jury which indicted him; and it fails to charge any offense under the laws of the United States, particularly Title 26 U.S.C., Sections 7201 or 7206(1).

2. Count I of the indictment on its face is barred by the six year statute of limitations, Title 26 U.S.C., Section 6531, and the statute is not tolled by the complaint issued, for the following reasons:

(a) The complaint and affidavit of Special Agent Thompson, in support thereof, is invalid on its face; the complaint [fol. 52] and affidavit are vague and indefinite; they are *pro forma* and merely state the conclusion of the affiant; they are, on their face, based on hearsay, and there is no basis alleged in the affidavit and complaint for crediting the hearsay; there are no facts alleged showing probable cause to believe defendant committed the offense alleged; issuing of the complaint and summons under the foregoing circumstances violated the probable cause requirement of the Fourth Amendment to the Federal Constitution; and the issuance of the complaint under these circumstances violated Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure.

(b) The Commissioner acted illegally, unlawfully and in violation of his duty in issuing the complaint and summons based upon the affidavit of Special Agent Thompson; he failed to accord defendant a hearing as required under Rule 5(c), thereby failing to give defendant the opportunity to "cross-examine witnesses against him" and present evidence for the purpose of determining whether there was in fact probable cause to believe he committed an offense; the Commissioner failed to make any sort of investigation or inquiry of Thompson before issuing the complaint and improperly issued the complaint based solely on the affidavit of Thompson; the issuance of the complaint and summons under the foregoing circumstances violated the probable cause requirements of the Fourth Amendment to the Federal Constitution; and the issuance of the complaint under these circumstances violated Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure.

(c) Special Agent Thompson did not in fact have probable cause to believe defendant had committed an offense when he swore under oath that he did have such evidence; the affidavit is *pro forma* and clearly was not prepared by Thompson; defendant was not given the opportunity to cross-examine Thompson before this Court as to his prob-
[fol. 53] able cause, or as required by Rule 5(c) of the Federal Rules of Criminal Procedure; if defendant is not to be permitted to cross-examine Thompson as to probable cause, the defendant is conclusively bound by the statement of a witness he is not entitled to cross-examine, which is contrary to Anglo-American jurisprudence and accordingly deprives defendant of due process of law under the Fifth Amendment; the issuance of the complaint and summons under these circumstances deprives defendant of due process of law under the Fifth Amendment and violates the probable cause requirement of the Fourth Amendment; and the issuance of the complaint under these circumstances violates Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure.

3. The Government was guilty of laches; there was unnecessary delay in filing a complaint in the instant case, and presenting the case to the grand jury; and as a result, defendant was denied his right to a "speedy trial" under the Sixth Amendment to the Federal Constitution; and further, the unnecessary delay on the part of the Government was in violation of Rule 48(b) of the Federal Rules of Criminal Procedure.

Morris A. Shenker, 408 Olive Street, St. Louis 2, Mo., CH 1-6116,

James Patrick Quinn, 1104 Oak Street, Kansas City, Mo.,

Kenneth Cohn, 700 Lathrop Building, Kansas City 6, Mo.,

Attorneys for Defendant.

Hearing Requested.

[fol. 54] Proof of Service (omitted in printing).

[fol. 55] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION
No. 21547-3

[Title omitted]

ORDER OVERRULING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT—November 8, 1963

Defendant was indicted for failure to pay his income taxes for the years 1956, 1957 and 1958, and he has filed "Supplemental Motion to Dismiss the Indictment", alleging that, "The indictment and each count is vague, indefinite and duplicitous; it fails adequately to inform the defendant of the charges against him," and follows the usual attack upon the indictment.

It also alleges that it is barred by the six year statute of limitations, and that:

> "The Commissioner acted illegally, unlawfully and in violation of his duty in issuing the complaint and summons based upon the affidavit of Special Agent Thompson; he failed to accord defendant a hearing as required under Rule 5(c), thereby failing to give defendant the opportunity to 'cross-examine witnesses against him' and present evidence for the purpose of determining whether there was in fact probable cause to believe he committed an offense; * * *."

[fol. 56] The same motion was before the court and overruled in a Memorandum and Order dated September 4, 1963, in which the provisions of the indictment were set out. In that order the court ruled upon all of the questions that have now been raised in defendant's Supplemental Motion.

Apparently the only ground for the filing of this motion is that a similar question involving the sufficiency of the Complaint was before the court in *U. S. A.* v. *Hyman Green-*

berg, on July 15, 1963, and reported in 320 F. 2d. 467 (9 Cir.) where a complaint was filed prior to the return of an indictment, obviously for the purpose of tolling the statute of limitations.

The complainant, a special agent of the Internal Revenue Service, made an affidavit which is in almost the exact language as that in the affidavit filed in the case now under consideration. That court held that the Commissioner could not determine for himself upon the complainant's affidavit, that probable cause existed for issuing the summons or warrant, and that the complaint so filed, did not toll the statute of limitations.

The question with which we are concerned here was before Judge Oliver of this court in *U. S. A.* v. *Black,* 216 F. S. 644, where the affidavit was identical with the one under consideration here. Judge Oliver in a well considered opinion, (written before U. S. A. vs Greenberg had been decided), overruled the defendant's Motion to Dismiss. [fol. 57] Since *Greenberg* and *Black,* supra, the identical question was before the Tenth Circuit in *Sanseverino* vs *U. S.,* 321 F. 2d. 714. That court said among other things:

> "The filing of such complaint, when made by the examining agent and affirmatively stating that the complaint is based upon his personal investigation, effectively tolls the statute under the proviso of Sec. 6531 which provides in part: * * *"

A hearing was conducted on defendant's first motion in this court. The agent who made the affidavit testified, and also the commissioner. The commissioner, after explaining what took place at the time the summons was issued, stated:

> "I read the Complaint and decided it was sufficient and signed my name to the summons."

It is very apparent from that that the commissioner made his own decision based upon the information that was given to him.

In his testimony, the agent gave the names of the partnerships, the records of which he examined. If an Internal Revenue agent may not be permitted to make an affidavit

based upon information obtained by him from an examination of a taxpayer's personal books and records, I do not see how he could ever make an affidavit sufficient to obtain a warrant.

I think it may truthfully be said in considering the definition of "personal knowledge" that knowledge obtained from an investigation of such personal records as the defendant's own bookkeeping records would imply personal knowledge if that is required in this type of case.

[fol. 58] Defendant seems to complain that he was not permitted the right to cross examine witnesses to determine whether or not there was any justification for issuing a complaint, or anything to show probable cause.

Following the issuance of the summons, the defendant was admitted to bail and thereafter was indicted. There was never any preliminary hearing, after the indictment was returned. There was no further reason to proceed under the complaint.

It is my conclusion that the information was sufficient upon which to base the issuance of the summons, and that its effect was to toll the statute of limitations.

Said Motion to Dismiss is therefore overruled.

Richard M. Duncan, Judge.

[fol. 59] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

No. 21547-3

[Title omitted]

Excerpt From Transcript of Proceedings—December 2, 1963

Be It Remembered, that on Monday, December 2, 1963, the above entitled cause came on regularly for trial before the Honorable Richard M. Duncan, Judge, at the Court House in Kansas City, Missouri.

APPEARANCES:

The Plaintiff was represented by Messrs. K. William O'Connor and Stephen Koplan, Special Attorneys, The Department of Justice, Washington, D. C.

The Defendant was present in person and represented by his Attorneys, Mr. Morris Shenker and Mr. E. Shapiro of the St. Louis Bar and Mr. James P. Quinn of the Kansas City Bar.

Whereupon, the following proceedings were had and entered of record:

The Court: Members of the jury, we are a little late this morning. The time set was ten o'clock. We are not going [fol. 60] to need the jury this morning. You may feel that we should have called you and let you know. It was impossible until a few minutes ago to determine that your services would not be needed. Bringing all of you back here seems an unusual expense and a waste of your time, but let me suggest to you that if there hadn't been some disposition made otherwise, the twelve of you who were called would have been here until about the 10th of January. So you may be thankful because this case would have taken anywhere from 2 to 3 weeks to try. You may be thankful that the 12 of you, whoever you might have been, will not have to serve. There will be a plea so you are going to be excused until 9:30 o'clock on Wednesday of this week. Report to the Clerk's office for service in Judge Gibson's court room.

Are you ready for United States versus Max Jaben?

Mr. O'Connor: The Government is ready.

The Court: Proceed, Mr. Shenker.

Mr. Shenker: In the case of United States versus Max Jaben, if it please the Court, the Court is aware of the fact that the defendant has heretofore filed various motions, among which were Motions to Dismiss Count I and alleging, among other things, that it was barred by the statute of limitations and the complaint and proceedings were insufficient to toll the statute, and that thereafter, if your Honor recalls, we filed a writ of prohibition or in the [fol. 61] alternative, a writ of certiorari, to the Court of Appeals seeking from that court an order declaring the

petition barred by the statute of limitations. That petition was denied a few days ago by the Eighth Circuit without prejudice, it being the sincere contention of counsel for the defendant as set out in the motions, that the petition indicated to be filed before the Court of Appeals is invalid and barred by the statute of limitations.

PERMISSION REQUESTED TO WITHDRAW PLEA OF NOT GUILTY AND TO ENTER PLEA OF NOLO CONTENDERE

The defendant is cognizant of the fact that a trial on the merits would entail considerable time and would be at great expense, not only to the Government, but to the defendant. There is no desire on the part of the defendant to contest the facts pertaining to Count I of the indictment, and we therefore ask leave of Court for permission to withdraw the former plea of not guilty that was entered for and on behalf of the defendant or by the defendant and respectfully ask the Court to accept in this instance as to Count I a plea of *nolo contendere* as to Count I as to the facts, and the defendant will offer no evidence to dispute or contradict the facts in this count and if the Court should enter a judgment of guilty on that plea of *nolo contendere* to Count I, that the defendant will then have an opportunity to have the question as to whether the said coun, is barred by the statute of limitations decided upon by the Eighth Circuit Court of Appeals or by the Supreme Court, and that the [fol. 62] plea of *nolo contendere* is not to preclude the defendant from taking an appeal on the issue at that time.

* * * * * * *

[fol. 63] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 64]

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 21547

(Vio: Sec. 7201, T. 26, USC)

UNITED STATES OF AMERICA

v.

MAX JABEN

JUDGMENT AND COMMITMENT—January 7, 1964

On this 7th day of January, 1964 came the attorney for the government and the defendant appeared in person and by counsel. On Dec. 2, 1963 defendant, by leave of Court, withdrew his former plea of not guilty to Ct. 1 of the Indictment herein and tendered a plea of nolo contendere, which was accepted by the Court. Sentence deferred to this date pending pre-sentence investigation. Cts. 2 & 3 dismissed this day by leave of Court.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere to Ct. 1, entered herein on December 2, 1963, of the offense of wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue, a false and fraudulent income tax return for said calendar year, as charged in Count 1 of the Indictment filed herein; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of two (2) years; without costs.

Execution of All But four (4) months of said sentence of imprisonment is suspended and defendant is placed on probation for a period of twenty (20) months under the general conditions of probation adopted by the Court, and under the special conditions that during said period of probation the defendant shall refrain from gambling and from associating with persons known to be gamblers; conditions of probation will be communicated to defendant orally and in writing by the U. S. Probation Office.

It Is Adjudged that said period of probation is to commence upon expiration of sentence of imprisonment imposed herein.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form: K. William O'Connor, Special U. S. Attorney.

R. M. Duncan, United States District Judge.

The Court recommends commitment to: None recommended.

(Signed) J. C. Truman, Clerk, By D. D. Daniel, Jr., Deputy Clerk.

[fol. 65] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

No. 21547-3

[Title omitted]

NOTICE OF APPEAL—Filed January 15, 1964

1. Name and Address of Appellant:

Max Jaben, 1208 West 85th Terrace, Kansas City, Missouri.

2. Name and Address of Appellant's Attorneys:

Morris A. Shenker, 408 Olive Street, St. Louis 2, Missouri

James Patrick Quinn, 1104 Oak Street, Kansas City 6, Missouri

3. Offense Charged:

Knowingly attempting to defeat and evade income taxes owing the United States by filing a false and fraudulent income tax return on April 16, 1957, for the calendar year 1956, in violation of 26 U. S. C., Section 7201.

4. Concise Statement of Judgment:

Judgment of January 7, 1964 convicting defendant on his plea of nolo contendere, and committing him to a term of two years, four months of which is to be spent in confinement and twenty months on probation, with special conditions imposed for probation.

5. Defendant is on bail.

Dated: January 15, 1964.

[fol. 66] I, the above-named defendant, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the above-stated judgment.

Max Jaben, Appellant.

Morris A. Shenker, 408 Olive St., St. Louis 2, Mo.; James Patrick Quinn, 1100 Oak Street, Kansas City 6, Mo., Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 67] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 68]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,566

Appeal from the United States District Court for the Western District of Missouri.

MAX JABEN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

OPINION—June 16, 1964

Before Vogel, Matthes and Ridge, Circuit Judges.

MATTHES, Circuit Judge.

Max Jaben (hereinafter called "appellant") tendered a plea of nolo contendere to Count I of an indictment charging him with attempted evasion of income tax for the year 1956. The plea was accepted by the court (Judge

Duncan), and thereafter judgment of conviction was entered. The indictment was filed on May 17, 1963, more than six years after the offense alleged in Count I had been committed (April 16, 1957); however, the complaint upon which the summons was issued was filed on April 15, 1963, and within the limitation period.[1] This appeal pre- [fol. 69]- sents the sole question whether the offense is barred by the statute of limitations. In order to resolve this issue, we must scrutinize the complaint and determine whether it was sufficient to enable the United States Commissioner to ascertain that probable cause existed within the rationale and teachings of the Supreme Court in *Giordenello v. United States*, 357 U.S. 480 (1958), and consequently whether it was sufficient to toll the statute of limitations.

A summary of the facts, all undisputed, will serve to place the issue in proper perspective.

On April 15, 1963, David A. Thompson, Special Agent of the Internal Revenue Service, signed, swore to and filed the complaint around which the controversy is centered. Because of its importance, the complaint is set out in full in the margin under footnote 2.[2] The United States Com-

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[1] 26 U.S.C. § 6531, relating to periods of limitation on criminal prosecutions, provides in pertinent part that the period of limitation for prosecution for the offense of wilfully attempting in any manner to evade or defeat payment of any tax, is six years. This section further provides that, "Where a complaint is instituted before a commissioner of the United States within the period above limited [six years], the time shall be extended until the date which is 9 months after the date of the making of the complaint * * *."

Under the 1939 Code, § 3748(a), apparently applicable in *Zacher* v. *United States*, 8 Cir., 227 F.2d 219, 224-225 (1955), cert. denied, 350 U.S. 993 (1956), and *Burger* v. *United States*, 8 Cir., 262 F.2d 946, 953 (1959), cert. denied, 359 U.S. 990 (1959), the period of limitation was extended "until the discharge of the grand jury at its next session within the district." For analysis of 26 U.S.C. § 6531 and the amendment, see 1954 U.S. Code Cong. & Adm. News, pp. 4564, 5236.

[2] "The undersigned complainant, being duly sworn, states:

"That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said

[fol. 70] missioner determined from the complaint that probable cause existed and thereupon issued a summons directing appellant to appear before the Commissioner on May 15, 1963. On May 17, an indictment in three counts was filed in the United States District Court alleging that appellant had attempted to evade payment of income taxes for the years 1956, 1957 and 1958 by filing false and fraudulent income tax returns for those years on April 16, 1957, April 15, 1958, and July 13, 1959, respectively.

On July 2, appellant filed a motion to dismiss the indictment, specifically alleging as to Count I that the offense therein charged was barred by the six-year statute of limitations, and that the statute was not tolled by the complaint filed on April 15. After a hearing, the court on September 4 denied the motion. *United States* v. *Jaben*, W.D.Mo., 225 F.Supp. 47 (1963). Thereafter, on November 1, appellant filed a supplemental motion to dismiss the indictment—again most strenuously attacking Count I, apparently because of the Ninth Circuit's opinion in

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taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, in the Western District of Missouri, Max Jaben did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

(Signed) David A. Thompson
DAVID A. THOMPSON
Special Agent
Internal Revenue Service
Kansas City, Missouri."

United States v. *Greenberg*, 320 F.2d 467 (1963). This motion was denied on November 8. *United States* v. *Jaben*, W.D.Mo., 226 F.Supp. 757 (1963).

On December 2, the plea of nolo contendere to Count I of the indictment was tendered by appellant and accepted by the court. Counts II and III of the indictment were dismissed, and on January 7, 1964, judgment was entered [fol. 71] on appellant's plea. Appellant was sentenced to imprisonment for a term of two years, but execution of all but four months of the sentence was suspended, and appellant was placed on probation for twenty months. This appeal is from the judgment of conviction on the plea.

We note initially that the question whether the offense is barred, a question appropriately raised by the motions to dismiss, is not foreclosed by the plea of nolo contendere. Appellant has the right to appeal from the judgment entered on the plea and to secure an adjudication of the question by this court. *Melrose Distillers, Inc.* v. *United States*, 4 Cir., 258 F.2d 726, 727 (1958), affirmed, 359 U.S. 271 (1959). Compare also, *Lott* v. *United States*, 367 U.S. 421 (1961).

Appellant concedes that the complaint was filed within six years after the alleged offense was committed and recognizes that if the complaint is legally sufficient, the indictment, even though filed after the limitation period, is timely and supports the judgment of conviction. Conversely, the Government concedes that if the complaint is legally defective, the statute was not tolled by the filing thereof and the prosecution is barred. No other conclusion is permissible in view of 26 U.S.C. § 6531, and prior adjudications by this court. *Burger* v. *United States*, supra, 262 F.2d 946; *Zacher* v. *United States*, 227 F.2d 219.

Buttressed by the holding in *United States* v. *Greenberg*, supra, 320 F.2d 467, appellant's position, in summary, is that the challenged complaint is invalid on its face, in that it is vague, indefinite, is *pro forma*, and merely states the conclusion of the affiant; that it is based upon hearsay and no basis is alleged for crediting the hearsay; and that since no facts are alleged showing probable cause to believe that appellant committed the offense charged, the [fol. 72] issuance of the summons violated the probable

cause requirement of the Fourth Amendment to the United States Constitution and Rules 3 and 4, Fed. R. Crim. P.[3] Beyond cavil, *Greenberg*, supra, 320 F.2d 467, which struck down an almost identical complaint, supports appellant's position. However, that holding is not binding upon us, and with all due deference, we are not inclined—for what we regard to be impelling and cogent reasons—to follow that case.

Unquestionably, and as recognized by appellant and the Government, the controlling authority is *Giordenello v. United States*, supra, 357 U.S. 480. The parties differ, however, in their interpretation of the test which *Giordenello* established for determining whether the complaint satisfies the probable cause requirement.

It is well to have in mind that in *Giordenello* the pertinent part of the complaint read:

> "'The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.'" 357 U.S. at 481.

The crux of the holding in *Giordenello* on the issue before us is articulated as follows at pp. 485-486 of the opinion:

> "Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn [fol. 73] complaint (1) setting forth 'the essential facts

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[3] Rule 3, Fed. R. Crim. P., provides: "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4 provides in pertinent part that if it appears from the complaint that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant shall issue; or upon the request of the attorney for the Government, a summons instead of a warrant shall issue.

constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it. . . .' The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that '. . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized,' of course applies to arrest as well as search warrants. See *Ex parte Burford*, 3 Cranch 448; *McGrain* v. *Daugherty*, 273 U.S. 135, 154-157. The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U.S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

"When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

[fol. 74] Unlike *Giordenello*, here the complainant (Agent Thompson) stated under oath that he had personally investigated the tax liability of appellant; he set forth the nature of that investigation and stated that based upon the investigation he had "personal knowledge" that appellant had committed the offense which formed the basis of Count I of the indictment. In our view, the complaint does "pass muster" because it does provide a basis for the Commissioner's determination of the existence of probable cause.

Complaints substantially identical to the one under consideration were held invulnerable to the same attack appellant advances by at least two other district courts, *United States* v. *Black*, W.D. Mo., 216 F.Supp. 645 (1963) (Judge Oliver), and *United States* v. *Scheetz*, S.D. Ind., 224 F.Supp. 789 (1963) (Chief Judge Steckler).

Additionally, the identical question was raised before the Tenth Circuit in *Sanseverino* v. *United States*, 321 F.2d 714 (1963).[4] There, the appellant had urged that, "The complaint was not sufficient to toll the statute for the further reason that it does not show the matters were in the personal knowledge of the affiant and no showing that testimony was taken." In response, the Government, after an extended discussion of *United States* v. *Freeman*, S.D. Ind., 165 F.Supp. 121 (1958), and *Giordenello* v. *United States*, supra, 357 U.S. 480, stated,

> "The complaint fully meets the test set forth in *Giordenello* in respect of complainant's *personal knowl-*
> [fol. 75] *edge* of the matters therein set forth, and in respect of the *sources for complainant's belief* that a crime had been committed."

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[4] Appellant admits that the briefs in *Sanseverino* (provided to this Court by appellant) contain some discussion of the question before us. However, appellant discounts *Sanseverino's* applicability, claiming that there no challenge to the complaint was made in the trial court, and consequently the Tenth Circuit did not discuss it, apparently thinking the issue waived.

Although the complaint does not appear in the reported opinion in *Sanseverino*, a true copy of such complaint was filed with the district court here and appears as a part of the original files. The complaint is similar, although perhaps not quite as complete, as the one before us.

The Tenth Circuit, without reference to the arguments summarized above, held:

> "The filing of such complaint, when made by the examining agent and affirmatively stating that the complaint is based upon his personal investigation, effectively tolls the statute under the proviso of Section 6531. . . ." 321 F.2d at 715.

We are constrained to observe additionally that if *Giordenello* is to be accorded the broad meaning and application contended for by appellant, then the result could conceivably be the elimination entirely of the filing of complaints by agents of the Internal Revenue Service who have conducted an investigation of the liability of a taxpayer. As stated by Judge Duncan, supra, 226 F. Supp. at 758, "If an Internal Revenue agent may not be permitted to make an affidavit based upon information obtained by him from an examination of a taxpayer's personal books and records, . . . [we] do not see how he could ever make an affidavit sufficient to obtain a warrant." We do not believe such result was intended; certainly it would not be desirable, and is not necessary to protect the constitutional rights of the alleged offender.

The trial court properly held that the complaint tolled the statute of limitations. The judgment of conviction is

Affirmed.

[fol. 76] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,566 September Term, 1963

MAX JABEN, Appellant,

vs.

UNITED STATES OF AMERICA.

JUDGMENT—June 16, 1964

Appeal from the United States District Court for the Western District of Missouri.

Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Max Jaben, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

Order entered in accordance with Opinion:

Robert C. Tucker, Clerk, U. S. Court of Appeals for the Eighth Circuit.

[fol. 77] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17566

[Title omitted]

ORDER DENYING PETITION OF APPELLANT FOR A REHEARING—July 9, 1964

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

Order entered at direction.

Robert C. Tucker, Clerk, U. S. Court of Appeals, 8th Circuit.

[fol. 78] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 79]

SUPREME COURT OF THE UNITED STATES

No. 347, October Term, 1964

MAX JABEN, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 19, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.